Nos. 731, 765, Misc.

In the Supreme Court of the United States

OCTOBER TERM, 1960

ANTHONY CARMINATI, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

MICHAEL GALGANO, PETITIONER

v.

UNITED STATES OF AMERICA

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the court of appeals is reported *sub nom. United States* v. *Galgano* at 281 F. 2d 908. The

opinion of the district court is reported *sub nom. United States* v. *McKenney* at 181 F. Supp. 143.

JURISDICTION

The judgment of the court of appeals was entered on August 22, 1960. A petition for rehearing was denied on September 28, 1960. The time for filing a petition for a writ of certiorari in No. 765 Misc. was extended on December 28, 1960, by order of Mr. Justice Brennan, to and including January 26, 1961, and the petition for a writ of certiorari was filed on January 27, 1961.[1] The time for filing a petition for a writ of certiorari in No. 731 was extended on December 28, 1960, by order of Mr. Justice Brennan, to and including February 1, 1961 and that extension was enlarged by subsequent orders of the Chief Justice to and including February 15, 1961. The petition for a writ of certiorari was filed on February 15, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the fact that an indictment charging a conspiracy to violate the narcotics laws cited the general conspiracy statute (18 U.S.C. 371) as the statute violated precluded the imposition of heavier penalties specified for second offenders in the statutes

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[1] In view of the fact that petitioner had a total of 120 days in which to file his petition for a writ of certiorari, we believe the late filing, one day after the expiration of the extension granted by Mr. Justice Brennan, should preclude its consideration.

relating specifically to narcotics violations and conspiracy to commit such offenses.

2. Whether, in the particular circumstances of this case, the failure of the trial judge to ask petitioner Carminati, before sentencing, whether he had anything to say requires remand to the district court for resentencing.

STATUTES AND RULE INVOLVED

21 U.S.C. 174 (July 18, 1956, ch. 629, Title I, § 105, 70 Stat. 570) provides in pertinent part:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.
>
> * * * *

Before its amendment in July, 1956, that statute read as follows (21 U.S.C. (1952 ed.) 174):

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United

States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. * * *

* * * *

26 U.S.C. 7237 (July 18, 1956, ch. 629, Title I, § 103, 70 Stat. 568) provides in pertinent part:

Violation of laws relating to narcotic drugs and to marihuana.

(a) Whoever commits an offense, or conspires to commit an offense, described in part I or part II of subchapter A of chapter 39 for which no specific penalty is otherwise provided, shall be imprisoned not less than 2 or more than 10 years and, in addition, may be fined not more than $20,000. For a second offense, the offender shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000.

Before its amendment that statute read as follows (26 U.S.C. (1952 ed., Supp. III) 7237):

(a) Whoever commits an offense or conspires to commit an offense described in part I, or part II of subchapter A of chapter 39 for which no

> specific penalty is otherwise provided, shall be fined not more than $2,000 and imprisoned not less than 2 or more than 5 years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than 5 or more than 10 years. * * *

Rule 7(c) Federal Rules of Criminal Procedure provides:

> * * * The indictment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice.

STATEMENT

Petitioners Galgano and Carminati filed separate motions under 28 U.S.C. 2255 in the United States District Court for the Southern District of New York for correction of sentences imposed after conviction for conspiracy to violate federal narcotics laws (1 Pet. 4, 2 Pet. 7-8). The sentences which petitioners seek to have reduced were imposed after conviction on a conspiracy count of a multi-count indictment returned on November 19, 1956 in the same court. The indictment covered a period spanning the enactment of the Narcotic Control Act of 1956, which, in July 1956, increased the penalties for narcotics violations. The objects of the conspiracy were stated, in separate paragraphs, as follows: to distribute drugs not in

the original stamped package, in violation of 26 U.S.C. 4704(a) (Par. 2); to possess narcotics without having registered and paid the tax, in violation of 26 U.S.C. 4724(c) (Par. 3); and to deal in unlawfully imported narcotics, in violation of 21 U.S.C. 173 and 174 (Par. 4). Twenty-three overt acts were alleged, the first in April 1955, and the last eleven after July 1956. In parenthesis, at the end of the conspiracy count (following the last of the 23 overt acts) was the notation: Title 18, United States Code, Section 371 (R. 8; 1 Pet. App. 4).[2]

Petitioners and two others were tried before a jury. At the trial, in the instructions to the jury, the judge said, in part (R. 10-11; 1 Pet. 5, 2 Pet. 24):

> This indictment is bottomed upon Section 371 of Title 18 of the United States Code, the conspiracy statute, which makes it an offense if two or more persons conspire to commit any offense against the laws of the United States, and one or more of such persons does any act to effect the object of the conspiracy.
>
> Putting it another way—the defendants are not charged with violation of the Harrison Act or the Jones-Miller Act—those would be substantive violations. They are charged under the 14th count with a conspiracy to violate those laws.

The jury found petitioners guilty on the conspiracy count (R. 18-19; 1 Pet. 5, 2 Pet. 4).

On February 5, 1957, petitioners appeared for sentencing (R. 19-21; 1 Pet. 5, 2 Pet. 4). Galgano ad-

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[2] The certified record in the court of appeals has been filed in No. 731 and is designated herein as R. The *Galgano* petition, No. 765 Misc., is designated "1 Pet."; the *Carminati* petition, No. 731, is designated "2 Pet."

mitted that he had been convicted in 1938 of unlawfully importing and selling heroin in violation of 21 U.S.C. 173 and 174 (R. 29, 33), but objected to imposition of sentence as a second offender under the provisions of 21 U.S.C. 174 on the ground that the indictment carried a notation referring to 18 U.S.C. 371 (R. 29-33). Finding that the indictment charged and evidence adduced at the trial showed a conspiracy falling within the proscriptions of 21 U.S.C. 174, and that the conspiracy continued beyond the effective date of the 1956 amendments to the narcotics laws increasing penalties for second offenders, the sentencing judge imposed a sentence of ten years, the minimum for second offenders under 21 U.S.C. 174 (R. 34-35).

On February 14, 1957, Carminati was sentenced as a second offender to imprisonment for ten years. Before sentence was imposed, counsel for Carminati made an extensive plea for mercy for Carminati, attacking the evidence against him as developed at the trial, and stating that he had repeatedly asserted his innocence (R. 38-43). Petitioner, himself, made no statement.

Both petitioners appealed from the conviction, but did not question the validity of the sentence. The court of appeals, finding that a "conspiracy to violate the narcotics laws was conclusively proved", affirmed the convictions. *United States* v. *Carminati*, 247 F. 2d 640, 642 (C.A. 2), certiorari denied, 355 U.S. 883.[3]

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[3] The opinion in the court of appeals at one point referred to the conspiracy count as under 18 U.S.C. 371 but, as the opinion below in this proceeding notes, the matter was of no importance at that time.

In 1959, Galgano filed a motion under 28 U.S.C. 2255 for vacation of judgment and correction of sentence, claiming that he should have been sentenced to no more than the five year maximum provided in 18 U.S.C. 371 (R. 90-98). After hearing, the court denied the motion. *United States* v. *McKenney and Galgano*, 181 F. Supp. 143 (S.D.N.Y.) The court stated (p. 146):

> * * * The evidence adduced upon trial not only "conclusively proved" a conspiracy to violate the narcotics laws but it left no doubt that the hard core of the conspiracy was to violate section 174 of Title 21. The verdict of the jury must be read "guilty as charged in the indictment": it cannot be interpreted as anything less. It follows that petitioners were validly sentenced under Section 174 of Title 21. Accordingly their motions are denied.

In January 1960 a hearing was held on a motion filed by petitioner Carminati for vacation of sentence as a result of the failure of the sentencing judge to ask him whether he had anything to say prior to imposition of sentence (R. 44-59). This motion was denied, the court finding that, although there had been an unintentional failure to ask petitioner whether he had anything to say at the time of sentencing, no purpose would be served in resentencing him since the mandatory minimum sentence provisions of 21 U.S.C. 174 would require that the same sentence of ten years be reimposed (R. 60-64).[4]

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[4] The court interpreted Rule 32 of the Federal Rules of Criminal Procedure to require that the defendant be ac-

Carminati filed a subsequent motion for correction of sentence in 1960, contending that the evidence at the trial failed to show violation of 21 U.S.C. 174 and that therefore he should have been sentenced under either 18 U.S.C. 371 or 26 U.S.C. 7237, both of which permitted lower sentences than required by 21 U.S.C. 174 (R. 67). This motion was denied without opinion on the basis of the decision in *United States* v. *McKenney*, 181 F. Supp. 143 (2 Pet. 2; R. 87).

Both petitioners appealed from the denial of the motions to vacate sentence, and the court of appeals affirmed. *United States* v. *Galgano*, 281 F. 2d 908 (C.A. 2). The court held that petitioners had not been prejudiced by the mis-citation of 18 U.S.C. 371 because the government's burden of proof and the statutory presumption the petitioners were required to rebut were the same whether petitioners were to be punished under the Title 18 provision or under the provisions of the narcotics laws. The court held further that, in view of the mandatory sentence provisions of 21 U.S.C. 174, Carminati's claim that he was entitled to resentencing because he had been denied the right of allocution was without merit; to require a resentence for the same term would be "to exalt form over substance" (2 Pet. App. 24a).

ARGUMENT

1. Despite the clear provision of Rule 7(c), Federal Rules of Criminal Procedure, that mis-citation

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corded the opportunity to speak even though his counsel had made a plea for leniency (R. 60).

of a statute does not affect the validity of an indictment in the absence of a showing of prejudice, petitioners contend that the citation of 18 U.S.C. 371 in the indictment requires that they be sentenced under that statute, even though the conspiracy charged is to violate the narcotics laws. Petitioners maintain that the fact that the general conspiracy statute was cited in the indictment and referred to by the judge in his charge shows an irrevocable election to try and punish them under that statute. The short answer is that it is well settled that, where the acts charged in an indictment constitute a crime punishable under both a general and a specific statute, the specific statute governs, even though the general statute was cited by the grand jury as the basis of the indictment. See *United States* v. *Hutcheson*, 312 U.S. 219, 229; *Davis* v. *United States*, 279 F. 2d 576, 578 (C.A. 4); *Enzor* v. *United States*, 262 F. 2d 172, 174 (C.A. 5), certiorari denied, 359 U.S. 953; *United States* v. *McKnight*, 253 F. 2d 817, 820 (C.A. 2); *Masi* v. *United States*, 223 F. 2d 132, 133-134 (C.A. 5), certiorari denied, 350 U.S. 919. Both before and after the 1956 amendments, *i.e.*, for the entire period applicable here, the narcotics statutes specifically referred to conspiracy in authorizing penalties more severe for second offenders than those in 18 U.S.C. 371. It is thus clear that the Congress intended that persons conspiring to violate the narcotics laws be dealt with under the more stringent provisions of the narcotics laws (either 21 U.S.C. 174 or 26 U.S.C. 7237), rather than the general conspiracy statute, both under the Boggs Act (applicable before July

1956) and under the Narcotics Control Act of 1956. Petitioners concede that the indictment could lawfully have charged that the conspiracy violated 26 U.S.C. 7237 and 21 U.S.C. 174 (1 Pet. 7; 2 Pet. 28-29). The text of the indictment shows, we believe, that such a conspiracy was in fact charged. Paragraphs 2-4 of the indictment specifically charged as objects of the conspiracy the acts which constitute violation of the narcotics laws. Therefore petitioners cannot show that they were misled by the citation of 18 U.S.C. 371. The charge of the court, made for the purpose of enabling the jury to distinguish between the specific acts constituting unlawful traffic in narcotics and the crime of conspiring to commit those acts, could not have prejudiced petitioners by mentioning 18 U.S.C. 371 since the sole difference between that statute and 21 U.S.C. 174, as it relates to conspiracy, is in the measure of punishment.

2. The conspiracy count charged one conspiracy to commit various acts proscribed by Title 26 and 21 U.S.C. 174. The ten year sentence imposed is authorized (but not required as a minimum) for second offenders under 26 U.S.C. 7237; this was also true before the 1956 amendment. Ten years is the minimum required for second offenders under 21 U.S.C. 174 in its amended form; such a sentence was authorized prior to the amendment. Since, therefore, the ten year sentence was authorized for all periods as to all elements of the conspiracy covered by the indictment, the sentence was valid,[5] irrespective of

[5] Petitioner Carminati's assertion (2 Pet. 10-11, 38-44) that the provisions of 26 U.S.C. 7237 providing punishment

whether a lesser sentence might have been imposed under 26 U.S.C. 7237 or under 21 U.S.C. 174 before its amendment.[6]

The only reason that the question has any possible significance in this case is that, in ruling on the effect of the trial judge's failure to ask petitioner Carminati whether he had anything to say before sentence was imposed, the courts below ruled that there was no prejudice inasmuch as petitioner received the minimum required for second offenders under 21 U.S.C. 174.[7]

We think it clear that the trial judge, in the circumstances of this case, was bound to impose a minimum sentence of 10 years. As the district court stated (*United States* v. *McKenney*, 181 F. Supp. 143, 146), a conspiracy to violate 21 U.S.C. 174 was the "hard core" of the conspiracy.[8] Moreover, as

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for second offenders is unconstitutional under the Fifth and Sixth Amendments is without merit. The statute provides a basis for determining sentence to be imposed *after* conviction, and petitioner does not contend that the evidence of a prior conviction was improperly used in the trial of the matter for which he was convicted.

[6] See *United States* v. *Shackelford*, 180 F. Supp. 857 (S.D. N.Y.), a decision questioned in the opinion below, where the court ruled it had authority to sentence under the lesser penalties of Title 26 rather than the greater under Title 21.

[7] Although we discuss the merits of the allocution issue, it remains an open question whether the matter is one available on collateral attack. See *Green* v. *United States*, Nos. 70, 179, this Term, decided February 27, 1961, slip op., p. 3.

[8] The facts developed at the trial (see government's brief in opposition in Nos. 496 and 497, October Term 1957) show

Judge Waterman observed in the opinion below, "no defense was presented that would have afforded a rational basis for concluding that Carminati was guilty only of a violation of 26 U.S.C. 7237(a) or 18 U.S.C. 371 and not 21 U.S.C. 174" (2 Pet. 24a). In these circumstances, a remand for resentencing would be an idle gesture.*

CONCLUSION

It is respectfully submitted that the petitions for writs of certiorari should be denied.

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MARCH 1961.

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that the conspiracy related to heroin which cannot legally be imported and for the manufacture of which no opium may be imported.

* Petitioner attempts to read prejudice into his subsequent election (fourteen days after imposition of sentence) not to begin to serve his sentence pending the direct appeal, as a result of which he served 309 days for which he received no credit (2 Pet. 7, 9). That this course of events has no relationship to any prejudice resulting from the failure to accord petitioner the right to speak in his own behalf is clear, since it occurred two weeks after the imposition of the sentence and the accompanying error of which he complains.

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UNITED STATES OF AMERICA, *Respondent*.

ANSWER TO OPPOSITION OF RESPONDENT TO PETITION FOR A WRIT OF CERTIORARI

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ANSWER TO OPPOSITION OF RESPONDENT TO PETITION FOR A WRIT OF CERTIORARI

On January 9, 1957, the trial court instructed the jury:

"In *a* conspiracy charge there is no need to prove an actual violation of *a* specific law, or the sale or delivery, or the facilitation of the sale and delivery of narcotics. For two or more persons to conspire or combine to commit, or cause to be committed, a breach of the criminal laws of the United States is an offense of grave character. • • • *Because of this, a conspiracy to commit a crime is made by statute an entirely distinct offense, separate from the substantive crime itself.* • • •"

"This indictment is bottomed upon Section 371 of Title 18 of the United States Code, the conspiracy statute, which makes it an offense if two or more persons conspire to commit any offense against the laws of the United States, and one or more of such persons does any act to effect the object of the conspiracy. • • • Putting it another way, the defendants are not charged with violations of the Harrison Act or the Jones-Miller Act—those would be substantive violations. They are charged under the 14th Count with a conspiracy to violate those laws." (J.A. 10, 11.)

A further examination of the charge to the jury (J.A. 9 thru 16) will reveal that the jury was told to find Anthony Carminati guilty of a conspiracy in violation of 18 U.S.C. 371 and not of conspiring in violation of 21 U.S.C. 174. It did, and so did the Court of Appeals in 247 F. 2d 640, 642 on Aug. 22, 1957.

Nowhere did the court at any time state that the defendant was being tried for *a conspiracy in violation of 21 U.S.C. 174* as amended by the Narcotics Control Act of 1956.

The trial court further instructed the jury that

"• • • sections 4701, 4703, 4704(a), 4724(c) and 4771(a) of Title 26 of the United States Code, *sometimes referred to as the Harrison Act*, make it an offense to sell or distribute narcotics except from an original container to which are affixed revenue stamps; and also makes it illegal for one to sell or distribute narcotic drugs without registering with the Secretary of the Treasury for that purpose. *Then there are sections 173 and 174 of Title 21 of the United States Code, known as the Jones-Miller Act*, which make it a crime to import a narcotic drug into the United States contrary to law, or to receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment or sale of any such drug after importation—knowing the same to have been imported contrary to law. These are the laws which the Government charges the defendant(s) conspired to violate. • • •

> This indictment is bottomed upon section 371 of Title 18 of the United States Code, the conspiracy statute, which makes it an offense if two or more persons conspire to commit any offense against the laws of the United States, and one or more of such persons does any act to effect the object of the conspiracy." (J.A. 10.)

This instruction specifically refers to the Harrison Act and the Jones-Miller Act, neither of which contain a built-in conspiracy clause pertaining to substantive conspiracies relating to violations of narcotic laws.

Therefore, the claim that the statute on which an indictment is founded is to be determined from the facts charged in the indictment, and the facts pleaded may bring the offense within one statute, although another statute is referred to in the indictment, is not apropos to the instant case with the only possibility being that it could have been under the facts pleaded, brought, under Sec. 7237 of Title 26 as it appeared on the Statute books prior to July 19, 1956, but definitely not under 21 U.S.C. 174 as it appeared prior to July 19, 1956, although 18 U.S.C. 371 is referred to in the indictment. But even this possibility must fall by the wayside because of the court's specific instructions concerning the Harrison Act and the Jones-Miller Act. (See J.A. 11).

Your petitioner contends that the English language is not too hard to understand and when a jury is instructed that a defendant is not charged with violations of the Harrison Act or the Jones-Miller Act because those violations would be substantive violations, it means just that.

To set the record straight once and for all—the Harrison Narcotic Act at the time the indictment was drawn was no longer on the statute books!

The Harrison Narcotic Act was replaced by the Boggs Act on November 2, 1951! (P.L. 255, 82nd Congress.)

The Jones-Miller Act was replaced by the Boggs Act on November 2, 1951. (P.L. 255, 82nd Congress.)

When the trial judge instructed the jury that "Sections 173 and 174 of Title 21 of the United States Code known as the Jones-Miller Act make it a crime to import a narcotic drug into the United States contrary to law, or to receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment or sale of any such drug after importation—knowing same to have been imported contrary to law—and that this was the law the Government charged Carminati conspired to violate—he set the stage for the verdict of guilty under 18 U.S.C. 371 and specifically and forever ruled out his right to sentence Anthony Carminati as a second offender under the Narcotics Control Act of 1956, which replaced the Boggs Act on July 19, 1956. (P.L. 728, 84 Cong.)

If the trial court mistakingly or incorrectly identified section 174 of Title 21 U.S.C. as amended by the Narcotic Control Act of 1956, as the Jones-Miller Act, which later Act as part of the substantive statute contains a built-in conspiracy clause, then the jury surely was told that it could not find Anthony Carminati guilty of a conspiracy in violation of 21 U.S.C. 173, to violate sec. 174.

Therefore, a conviction of conspiracy under 18 U.S.C. 371 to violate the Harrison Act and/or the Jones-Miller Act, neither of which contain a built-in conspiracy clause, with the instructions as they were given and the indictment as it was written, limited the trial court as to what sentence it could impose, and misled the jury in its instructions.

But that limitation never saw the light of day because when Anthony Carminati appeared for sentencing, without even affording him the opportunity of speaking in his own behalf in mitigation of any sentence or affording him the opportunity of telling the court why any sentence should

not be imposed, a right that can't be waived under Rule 32(a) of the F.R.Cr. P. the court sentenced him thusly:

> "After taking into consideration all the factors which the Court deems pertinent in a matter of this kind, the defendant is sentenced to a period of ten years." (J.A. 43).

The jury's verdict in light of the instructions given, did not justify the trial court's conclusion that the core of the conspiracy was to violate 21 U.S.C. 174 so that it could apply the harsher punishments prescribed under that statute. (J.A. 86-87)

For the Respondent to attempt to explain away the errors committed by the lower courts and say that the Harrison Act means the various sections of Title 26 of the United States Code punishable under section 7237(a) of the Narcotic Control Act of 1956 which contains a built-in conspiracy substantive crime clause relating to narcotic drugs in particular and that the Jones-Miller Act really means sections 173 and 174 of Title 21 of the United States Code as amended by the Narcotics Control Act of 1956 which also contains a built-in conspiracy substantive crime clause relating to narcotic drugs which have been known to a defendant to have been illegally imported in the first place—is stretching the imagination a little too far.

For the record, the Harrison Act and the Jones Miller Act as such, were replaced by the Boggs Act in 1951, which, for the first time, included a built-in conspiracy clause within the substantive statute(s) involved and increased the punishment for violators and Sec. 2(a) of the Narcotic Drugs Import and Export Act as amended by the Boggs Act (P.L. 255, 82 Cong. Nov. 2, 1951) read in part—"Upon conviction for a second or subsequent offense"—the imposition or execution of sentence shall not be suspended and probation shall not be granted." • • •

That language is not too hard to understand. It says 'upon conviction' for a second or subsequent offense'—and to your petitioner it means upon a conviction had wherein he has been charged in the indictment for a second offense and found guilty by the jury for a second offense, and that if an attempt by statute to create any other way of making the defendant a second offender without being charged or tried as such but declared to be for the purpose of inflicting a harsher punishment, then that attempt on the part of Congress is beyond the power conferred by the Constitution and must be declared void.

No other logical explanation is possible since Section 174 of Title 21, U.S.C., a part of the Jones-Miller Act as enacted into law on May 22, 1922 and amended on June 7, 1924, (c. 352, 43 stat. 657) read exactly as the trial judge informed the jury. (J.A. 14, 15.)

The balance of the Act remained intact and effective until November 2, 1951 and read: "• • • such person, shall upon conviction, be fined not more than $5,000 and imprisoned for not more than ten years.

Not a single word in the Jones-Miller Act as it related to 21 U.S.C. 174 up to November 2, 1951 spoke of the crime of conspiracy in any fashion whatsoever!

Therefore, when Anthony Carminati was given a bald sentence of ten years, without being advised for what other crime other than knowing that he had been indicted for a conspiracy in violation of 18 U.S.C. 371, he received a sentence amounting to *double* the *maximum* allowed under 18 U.S.C. 371; the *maximum* under the Jones-Miller Act; the *maximum* under 21 U.S.C. 174 as amended by the Boggs Act which was in effect when the prosecution's witness said the conspiracy ended as far as Carminati was concerned, and *double* the *minimum* of the more lenient of the two minimum mandatory sentences under the Narcotics Control Act of 1956. (See Judge Levet's opinion in *U. S. v. Shackleford*, 180 F. Supp. 857, (2nd Cir.) (1957)) (J.A. 74-80.)

In the past, whenever 21 U.S.C. 174 was involved in a narcotics prosecution it was presumed that the heroin was imported and imported illegally and any protests made contrary to this presumption were ignored. (See Trial Court's instructions, J.A. 14, 15.)

But, when the Narcotics Control Act of 1956 became effective on July 19, 1956 and Chapter 68 headed "NARCOTICS"* was added to Title 18 of the United States Code

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*Report #1997, Calendar No. 2014, 84th Cong. 2nd Session:

"• • • The purpose of the proposed legislation is to establish a new chapter, "Chapter 68—Narcotics," in the Federal Criminal Code outlawing the drug heroin and defining crimes and providing increased penalties for the smuggling, sale and transportation of heroin and marihuana, etc. • • •"

(p. 7)—"• • • It is now unlawful to import or to produce heroin in this country. • • • (p. 12) ANALYSIS OF THE BILL:—Definitions:—Section 1401 defines for the first time in any Federal narcotic law the drug heroin according to its chemical properties. Such a chemical definition lends itself to a positive and accurate identification of the narcotic drug regardless of its derivation, whether extracted from the opium poppy by normal processes or manufactured synthetically.

HEROIN—PENALTIES: Section 1402 defines and provides penalties apart from the provisions of any other narcotic law for the unlawful importation of heroin or its sale subsequent to the unlawful importation. At present all prosecutions for engaging in such activity are brought under two Federal statutes, the Narcotics Drugs Import and Export Act, and the Harrison Anti-Narcotic Act. These two basic narcotic laws control and regulate every type of narcotic drug, including the newer synthetics.

This section is designed to supersede the provisions of the Narcotics Drugs Import and Export Act only insofar as they relate to the unlawful importation of heroin or its subsequent sale, and all future prosecutions will be brought under this section with its more stringent penalties. It is not the intention of the committee, either directly or indirectly to repeal or otherwise make inapplicable to heroin any of the relevant provisions of the Harrison Anti-Narcotic Act. • • •

and in the very first section, 1401, there appears—"The term 'heroin' shall mean any substance identified chemically as diacetylmorphine or any salt thereof" * * *—that confession on the part of the Government that heroin is a chemical, whose official formula is $C_{12}H_{23}O_5$, means that it can be produced synthetically in the laboratory anywhere, and doesn't have to be imported or brought in contrary to sec. 173 of Title 21 before persons dealing in the commodity or conspiring to deal in the commodity could be charged with a violation of the narcotic laws. (See J. Level's opinion regarding this very point, J.A. 76.) Now—since 21 U.S.C. 174 was in effect when Petitioner's case was prosecuted either as the Boggs Act or as amended by the Narcotics Control Act of 1956, he believes that before the Government undertook to prosecute him for a conspiracy in violation of that section, the presumption of importation was insufficient in light of 18 U.S.C. 1401, and unless that presumption was overcome by more than just another presumption, the only conspiracy he could have been charged with, tried for, convicted and punished for was the crime of conspiracy codified as 18 U.S.C. 371 and nothing else.

The first and elementary necessary proof needed to go forward (illegal importation) and prove the conspiracy *in violation of 21 U.S.C. 174* was lacking and was not offered.

That important shortcoming was called to the attention of the jury by the trial court thusly:

> "I direct your attention to another provision of the Jones-Miller Act. You will recall that two essential elements of the offense charged are:
>
> (1) that the heroin was unlawfully imported; and
>
> (2) that the defendant had knowledge of the unlawful importation.
>
> It will occur to you that no direct evidence was offered by the Government that the drug was imported or that the defendant had knowledge of such importation.

However, Section 174 of Title 21 of the United States Code, in the Jones-Miller Act, further provides: 'Whenever on trial for a violation of this section the defendant is shown to have or have had possession of the narcotic drug, such possession shall be deemed sufficient to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.' *Thus, under the law, possession of narcotics gives rise to an inference that the narcotics were imported contrary to law, and a further inference that the person in possession had knowledge of such unlawful importation.* Again, you understand it is not necessary to show actual physical or direct possession by any defendant. Possession of any sort—actual or constructive—is sufficient to raise the presumption under the statute which I have just read you and to place upon the accused the burden of explaining the possession to the jury."

It should therefore follow that before Anthony Carminati was even presumed to be guilty of a conspiracy *in violation of 21 U.S.C. 174* to commit the acts declared illegal under sec. 173 and 174 of Title 21 U.S.C., that the Government should have been required to offer proof that the narcotic was imported, and without that proof, the rest of the statute could not apply, from either the substantive or conspiracy section of section 174 as amended by the Narcotics Control Act of 1956, or for that matter, under the Boggs Act which was in effect when Carminati's participation in the conspiracy ended.

Judge Levet in his opinion concerning a co-defendant of Carminati's, Shackleford, in 180 F. Supp. 857, ruled:

"* * * It is also conceivable that persons might conspire to violate one statute without conspiring to violate the other. This, several persons might conspire to sell *domestic* narcotics, other than from the original stamped package, in violation of the Harrison Act. *In such case, since the narcotics were not imported, nor would there be the requisite possession to give rise to the presumption of unlawful importation, there would be, under those circumstances and conditions, NO violation of the Jones-Miller Act.*" (J.A. 76.)

To fortify Carminati's claim that the conspiracy, as far as he was concerned was over and done with for at least five months before the Narcotics Control Act of 1956 became effective—this Honorable Court's attention is called to Oglesby's* testimony, (P. 130 transcript Jan. 8, 1957):

> Q. So that the last (meeting) one you testify about was the latter part of January or February of 1956, is that right?
>
> A. That was the early part of 1956, the beginning of 1956.
>
> Q. Yes, January or February, isn't that what you said?
>
> A. Yes.
>
> Q. When was the next time?
>
> A. I don't remember seeing him again after that * * * until yesterday and today (January 7 and 8, 1957).

Query: If a conspiracy conviction can be had on the uncorroborated testimony of an accomplice, and that conspiracy, once established, is presumed to continue until the contrary is established, why shouldn't uncorroborated testimony of the same accomplice setting the cut-off date for the end of the conspiracy as far as the defendant is concerned be presumed and accepted too?

It is undoubtedly true that in several instances a presumption created by statute meets the tests of due process heretofore laid down by this Court, but when by another statute the rational connection between the facts proved and the ultimate fact presumed is weakened or destroyed, that statute becomes more than just a regulation of the legislature. It casts an unfair and practically impossible burden of persuasion upon the defendant, who in order to escape conviction only by testifying, is compelled, in violation of the Fifth Amendment, to give evidence against himself.

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*Chief government witness, chief informer and co-conspirator in C-151-226.

To apply that theory to the case at hand—21 U.S.C. 174 concerns itself with illegally imported heroin, known to have been illegally imported and the charge of conspiring to violate 21 U.S.C. 173 which forbids the importation or bringing in of heroin or the ingredient necessary to manufacture heroin without the sanction of the proper government agency charged with the control of this traffic.

Section 174 further decrees that whoever receives, conceals, buys, sells or facilitates the transportation of such illegally imported drug knowing that it had been imported and or brought in contrary to law, or conspires to commit any such acts *in violation of* the laws of the United States shall be punished in accordance with the provisions set out therein.

In *Yates v. U. S.*, 77 S. Ct. 1064 at 1073, 354 U. S. 298, at 311, 312, this Court held "the portions of the trial court's instructions are not clear or specific to warrant our drawing the inference that which the jury must find * * * in order to convict. (In the footnote marked 16, the Court notes: "The trial court did no more on this score than to charge in the language of the indictment, * * * and then instruct the jury that it must find that "the conspiracy charged in the indictment" had been proved beyond a reasonable doubt. "Further, in order to convict, the jury was required, as the court charged, to find an overt act which was knowingly done in furtherance of an object or purpose of the conspiracy charged in the indictment,"—and we have no way of knowing whether the overt act found by the jury was one which it believed to be in furtherance of (one) rather than the (other) objective of the alleged conspiracy. The character of most of the overt acts alleged associates them as readily with (one) as with (the other).

(In your petitioner's case, the alleged overt acts in accordance with the trial court's charge—"In a conspiracy charge there is no need to prove an actual violation of a specific criminal law, or the sale and delivery, or the facilitation of the sale and delivery of narcotics, (J.A. 9.) pointed to the general conspiracy statute and not to the ones referred to by the Government in its attempt to justify the present status of Anthony Carminati's case.)

The Court in the *Yates* case continued,

> "In these circumstances we think the proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which one the jury selected." (cases cited: *Stromberg* v. *State of California*, 283 U. S. 359, 367-368, 51 S. Ct. 532, 535, 75 L. ed. 1117; *Williams* v. *State of North Carolina*, 317 U. S. 287, 291, 292, 63 S. Ct. 207, 209, 210, 87 L. ed. 279; *Cramer* v. *United States*, 325 U. S. 1, 36, 65 S. Ct. 918, 935, note 45, 89 L. ed. 1441.)
> • • •
>
> "But the very subtlety of these distinctions required the most clear and explicit instructions with reference to them, for they concerned an issue which went to the very heart of the charges against these petitioners. The need for precise and understandable instructions on this issue is further emphasized by the equivocal character of the evidence in this record • • • Particularly in light of this record, we must regard the trial court's charge in this respect as furnishing wholly inadequate guidance to the jury on this central point in the case. We cannot allow a conviction to stand on such "an equivocal direction to the jury on a basic issue." *Bollenbach* v. *U. S.*, 326 U. S. 607, 613, 66 S. Ct. 402, 405, 90 L. ed. 350."

How very similar is this declaration to what can be claimed and decided in the instant case!

In *Tot* v. *U. S.*, 63 S. Ct. 1241 at pp. 1247, 1248, 319 U. S. 463 at 478, this Court stated:

"The procedural safeguards found in the Constitution and in the Bill of Rights (citing Chambers v. Florida, 309 U. S. 227, 237, 60 S. Ct. 472, 477, 84 L. Ed. 716,) stand as a constitutional barrier against thus obtaining a conviction, i.e.: (convicting on a charge even tho no evidence whatsoever has been offered which tends to prove an essential ingredient of the offense) (and) These constitutional provisions contemplate that a jury must determine the guilt or innocence in a public trial in which defendant is confronted with the witnesses against him and in which he enjoys the assistance of counsel; and where guilt is in issue, a verdict against the defendant must be preceded by the introduction of some evidence which tends to prove the elements of the crime charged. Compliance with these constitutional provisions, which of course constitute the supreme law of the land, is essential to due process of law, and a conviction obtained without their observance cannot be sustained. It is unnecessary to consider whether this statute, which puts the defendant against whom no evidence of guilt has been offered in a procedural situation from which he can escape conviction only by testifying, compels him to give evidence against himself in violation of the Fifth Amendment."

Yet, the court below in *Carminati* v. *U. S.*, 281 F. 2d 908, condemned the petitioner thusly:

"True it is that in a case involving the identical count of the indictment presently before us it was held that an objection to a duplicitous count may be raised for the first time by a motion under 28 U.S.C. 2255 if the two offenses charged in the count are not subject to punishment of the same severity. United States v. Shackleford, 180 F. Supp. 857 (S.D.N.Y. 1957). (But), The prior cases (cited by the court) offer no support for this distinction, and we think it peculiarly inapposite where no defense has been offered that would rationally permit a verdict of guilty under the statute which imposes the lesser penalty (here either 26 U.S.C. 7237(a) or 18 U.S.C. 371), but not under the statute which imposes the greater penalty (21 U.S.C. 174). We hold that appellants have waived

> any objection to any duplicity in the indictment. Therefore, we do not reach the question of whether Count 14 was in fact duplicitous."

From that opinion it seems that the Second Circuit approves of the very conduct condemned as unconstitutional under the theory and law prescribed in *Tot* v. *U. S.* case, 63 S. Ct. 1241, (*supra*) and considers it better practice for a defendant to give evidence against himself in violation of the Fifth Amendment, even though no evidence of guilt has been offered by the prosecution before or during the trial so that the charge under 21 U.S.C. 174 could hold water.

Ordinarily, when the Government counters a petitioner's complaint on an excessive sentence situation, the settled proposition that "a sentence which is within the legal limits of the statute involved will not be disturbed"—is of sufficient strength to cut off petitioner's prayer for relief unless, of course, reversible error has been committed whereby he would be entitled to either a new trial or outright release because of some violation of his Constitutional rights or entitled to some other form of relief as provided for by law.

However, in petitioner's case, the respondent's attempt to close the matter and the reason given, is not well taken.

In any event, Carminati, in accordance with the indictment drawn, the charge, the instructions and the verdict, the jury found him guilty of a conspiracy in violation of 18 U.S.C. 371 and nothing else. In *Gaddis* v. *U. S.*, 280 F. 2d 334, 336, the court ruled:

> "(When) There is an inconsistency, however, in the pronouncement of sentence and the judgment of conviction. * * * When there is any ambiguity, the prisoner is entitled to have the language in the pronouncement construed most favorable to him."

And, if the Government persists in justifying the imprisonment and sentence imposed on your petitioner under any statute other than 18 U.S.C. 371, it ought to at least concede that the sentence *might* have had some justification under sec. 7237 of Title 26 or sec. 174 of Title 21 as they existed prior to July 19, 1956, but—since the trial judge indicated that it was his intention to punish Carminati by giving him the mandatory minimum under the Narcotic Control Act of 1956 (which contains not one but two mandatory minimums for conspiracies in violation of the particular statutes involved)—he ought to be re-sentenced under the most lenient one. (See *Ladner* v. *U. S.*, 230 F. 2d 756, reversed and remanded 358 U.S. 169, 79 S. Ct. 209, 3 L. ed. 2nd 199. (Generally stated the "Rule of Lenity" is that where the intention of Congress is not clear from the Act itself, and reasonable minds might differ as to its intention, the Court will adopt the less harsh meaning. Also see opinion *U. S.* v. *Shackelford*, 180 F. Supp. 857, C-151-226, a co-defendant of the petitioner on C-151-226; *U. S.* v. *Ogull*, 149 F. Supp. 272; and *U. S.* v. *Bazzell*, 187 F. 2d 878).)

Your petitioner respectfully refers this Honorable Court to the decisions of this Court in *Blockburger* v. *U. S.*, 284 U.S. 299, 52 S. Ct. 180 and the language of the opinion used by the Court in *U. S.* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 73 S. Ct. 227, citing Chief Justice Marshall's statement in *U. S.* v. *Fisher*, 2 Cranch 358, 386, 2 L. ed. 304—"• • • Where the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived."

Justice Frankfurter, in delivering the opinion of the Court in the *Universal C.I.T.* case, *supra*, at p. 229 of 73 S. Ct. 227, continued:

"• • • Particularly is this so when we construe statutes defining conduct which entails stigma and penalties and prison. Not that penal statutes are not

> subject to the basic consideration that legislation like all other writings should be given, insofar as the language permits, a commonsensical meaning. But when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language clear and definite. We should not derive criminal outlawry from some ambiguous implication."

So when a sentencing court takes it upon itself to determine that where a jury brings in a verdict of guilty of a conspiracy to violate certain laws, and those certain laws contain built-in conspiracy clauses, each set of laws carrying with it a different punishment for those who conspire in violation of the substantive laws involved, why, or under what precept of law can the sentencing judge justify the harshest mandatory minimum sentence noted in the overall act by ruling that the hard core of the conspiracy was to violate the particular statute which carries with it the harshest sentence?

In *Delli Paoli* v. *U. S.*, 77 S. Ct. 294 at p. 300, 352 U.S. at p. 242, the Court states:

> "It is a basic premise of our jury system that the court states the law to the jury and that the jury applies that law to the facts as the jury finds them. * * * To say that the jury might have been confused amounts to nothing more than an unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict."

The jury was not instructed to find the defendant guilty of a conspiracy in violation of 21 U.S.C. 174—the jury found the defendant guilty of a conspiracy to violate 5 sections of Title 26 and 2 sections of Title 21 U.S.C.—and that guilty conduct was translated by the Court of Appeals for the Second Circuit in petitioner's first appeal taken on other grounds (247 F. 2d 640 (1957))—thusly:

"Appellant was convicted upon an indictment charging him with *'a conspiracy in violation of* 18 U.S.C. 371 to receive, possess, and sell heroin in violation of the federal narcotic laws. • • • ."

So to answer the Government's query in its opposition to Petitioner's plea for a writ of certiorari as to whether the fact that an indictment charging a conspiracy to violate the narcotics laws cited the general conspiracy statute (18 U.S.C. 371) as the statute violated, precluded the imposition of heavier penalties specified for second offenders in the statutes relating specifically to narcotic violations and conspiracy to commit such offenses—your Petitioner claims that in his instant case, under the circumstances and facts made known to the court, the answer ought to be that the sentencing court must be precluded from imposing the heavier penalties specified because of the language of the indictment, because of the explanation of the laws given by the court to the jury, because of the instructions, because of the verdict of the jury, and last but not least, because of your Petitioner's belief that "when Congress has not explicitly stated what the unit of offense is, the doubt ought to be judicially resolved in favor of lenity." *Bell v. U. S.*, 349 U.S. 81, 75 S. Ct. 620, 99 L. ed. 905.

And above all, your Petitioner firmly believes that when an act of Congress, such as the Narcotics Control Act of 1956 is written in such a vague and indefinite fashion wherein the separate crime of conspiracy is subject to different punishments at the whim of a trial court and where the method of determining a second offender for the purposes of inflicting harsher sentences is contrary to the Fifth and Sixth Amendments and in violation of Rule 7 of the Federal Rules of Criminal Procedure, then the whole act, ab initio, is unconstitutional.

Petitioner further asks this Honorable Court to recognize the ruling of the Hon. Justice Harlan in *Callan* v. *Wilson*, 8 S. Ct. 1301, 127 U.S. 540, wherein the Court stated:

> "* * * Except in that class or grade of offenses called 'petty offenses,' which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose, the guaranty of an impartial jury to the accused in a criminal prosecution, conducted either in the name or by or under the authority of the United States, secures to him the right to enjoy that mode of trial from the first moment, and in whatever court, he is put on trial for the offense charged. *In such cases, a judgment of conviction, not based upon a verdict of guilty by a jury, is void.*"

Anthony Carminati contends that if he was to be tried as a second offender, since the Act provides a harsher punishment for persons designated as second offenders, the judgment of conviction in his case, lacked the elementary essential safeguards guaranteed to him under the Constitution and the Federal Rules of Criminal Procedure, and if the Court of Appeals in 281 F. 2d 908, *supra*, insists that the judgment of conviction rendered in petitioner's original case is a conviction for a conspiracy in violation of 21 U.S.C. 174, such conviction was not based upon the verdict of the jury, and is void!

On page 11 of the Government's opposition—the statement "The charge of the Court, made for the purpose of enabling the jury to distinguish between the specific acts constituting unlawful traffic in narcotics and the crime of conspiring to commit those acts, could not have prejudiced petitioners by mentioning 18 U.S.C. 371 since the sole difference between that statute and 21 U.S.C. 174, as it relates to conspiracy, is in the measure of punishment."

It is patent that the error in the lower courts' reasoning and followed through by the Government here is more clear when the court below in 281 F. 2d 908 insists that

"the citing of 18 U.S.C. 371 which may have been a mistake or duplicitous (and it was not!)—does not prevent a conviction for conspiracy under 21 U.S.C. 174, or for that matter, under 26 U.S.C. 7237(a)".

That court forgets that the conviction was based on the indictment, and the jury's instructions—all indicating that the charge was a conspiracy in violation of 18 U.S.C. 371.

The specific portion of 21 U.S.C. 174 which the trial court applied in justifying the sentence imposed on Carminati reads:

> "• • • or conspires to commit any such acts in violation of the laws of the United States • • • "

should have put the court on guard that the language of the statute meant where *a conspiracy in violation of the* previously mentioned *substantive acts* was planned to be violated and not a conspiracy in violation of 18 U.S.C. 371 to violate the substantive sections mentioned in the first paragraph of the indictment.

Petitioner would therefore agree with the general proposition of law that where a general statute and a special statute cover the same area, that the special statute be construed and acknowledged as the proper one on which a defendant should be proceeded against, but he cannot agree that where the indictment is accepted by the defendant, the prosecution, the court and the jury as describing the crime of conspiracy in violation of 18 U.S.C. 371, that the court has a right to sentence the defendant under a separate, distinct and different criminal statute from that for which he was convicted.• • •.

On August 22, 1957, in *U. S.* v. *Carminati*, 247 F. 2d 640, the Court of Appeals for the Second Circuit ruled:

> "Appellant was convicted upon an *indictment charging* him with *a conspiracy in violation of 18 U.S.C. 371.* • • • "

This is res judicata!

On September 2, 1959, the trial court in denying the motions for relief filed by defendants Galgano and McKenney noted: "Petitioners * * * together with others, *were convicted upon a trial by jury of conspiracy to violate* certain provisions of the narcotics laws including section 174 of Title 21. * * * Count 14 of the indictment, the only one which concerns us here, charges in four paragraphs that petitioners and others *conspired to violate* seven specific provisions of law, namely * * *. Next appears a list of overt acts allegedly done in furtherance of the conspiracy. At the end of the list is the following citation, Title 18, U.S.C. Section 371."

On April 4, 1960, in denying petitioner's plea for relief under 28 U.S.C. 2255 and/or Rule 35 F. R. Cr. P., the trial court referred to the opinion of September 4, 1959 as its reason for denying petitioner's motion.

That opinion (sub. nom. *U. S.* v. *McKenney, et al.*, 181 F. Supp. 143), reads in part—"* * * Petitioners proceed on the assumption that Congress by the inclusion of the words 'or conspires' under the 1951 amendments to section 174 of Title 21 and section 7237(a) of Title 26, created a new, separate and distinct crime of conspiracy. *The amendments* to those sections simply related to the matter of punishment and *did not create a new crime.* * * *" (J.A. 85)*

On August 22, 1960, in *Carminati* v. *U. S.*, 281 F. 2d 908, the Court of Appeals for the Second Circuit stated:

> "* * * Count 14 charges a conspiracy *to violate* 21 U.S.C. 173, 174. *Such a conspiracy, if proven, constitutes in itself a violation of 21 U.S.C. 174.* Similarly, count 14 charges a conspiracy to violate 26 U.S.C. * * *; and such a conspiracy, if proven, constitutes a violation of 7237(a). Accordingly, while the citation of 18 U.S.C. 371 may have been either mistaken or duplicitous, it did not prevent *conviction* for conspiracy under 21 U.S.C. 174, or for that matter, under 26 U.S.C. 7237(a). * * *" (Appendix, Pet. B. 22a.)

Obviously, petitioner proceeded and assumed properly and correctly despite the trial court's insistence that the amendments to the sections involved "simply related to the matter of punishment and did not create a new crime."

The trial court's theory is contrary to this Court's findings in *U. S. v. Callanan*, 81 S. Ct. 321 (1961), where the substantive crimes under 18 U.S.C. 1951 and the built-in conspiracy clause of the same section were declared to be separate and distinct crimes. The headnote of the case reads:

> "Proceeding on motion to correct sentence imposed on a federal prisoner. * * * The Supreme Court, Mr. Justice Frankfurter held that the prisoner was convicted under the Hobbs Anti-Racketeering Act of the substantive crime of * * * and *was also convicted under such Act of conspiracy to commit the same crime, —was convicted of two distinct crimes*, and under such Act it was within the discretion of the trial judge to fix separate consecutive sentences *for each crime*."

In the original case, *Callanan v. U. S.*, 173 F. Supp. 98, Judge Weber stated:—"Movant was convicted in this court under an indictment in two counts charging him with conspiracy to extort in the first count and with the substantive offense of extortion in the second count. The indictment was based upon Title 18, sec. 1951, U.S.C., known as the Hobbs Anti-Racketeering Act."

Is it not a fact too that under the Sherman Anti-Trust Laws, 15 U.S.C. 1-7, et seq., that a defendant may and has been charged with a conspiracy and a substantive crime under section 1 of the Act and upon conviction, sentenced for being found guilty of two separate crimes, and haven't such findings been upheld by this Court?

Yet, in the Second Circuit, the district and circuit courts cannot agree as to whether or not such amendments do or do not create a new crime. (J.A. 85, 86.)

The Court of Appeals in 1957 in petitioner's case ruled—"Appellant was convicted upon an indictment charging him with a conspiracy in violation of 18 U.S.C. 371 * * *" (*U. S.* v. *Carminati*, 247 F. 2d 640).

Judge Levet writes (180 F. Supp. 857):

> "Consequently, count 14 of the indictment charges the defendant with conduct which is punishable under *three* separate sections, each of which entails a different punishment. (J.A. 75) * * * With the inclusion of the words, 'or conspires' in the *two* narcotic statutes (174 of Title 21 and 7237(a) of Title 26, U.S.C.), a conspiracy to violate the narcotic laws is now a crime under these statutes. (J.A. 76.) * * * In the instant case, the conspiracy count charges more than a single crime since it is now a distinct offense to conspire to violate either the Jones-Miller Act or the Harrison Act, and the latter is not necessarily includible in the former. (J.A. 78.) We cannot now ascertain upon which statute the jury based their general verdict of guilty. Although the evidence in the case (Shackleford's case) supports a conviction under both the Jones-Miller Act and the Harrison Act, it is my opinion that a sentence under the former, pursuant to which a greater penalty is imposed, would be prejudicial to the defendant * * * despite his failure to object to the duplicity before trial. Accordingly, the defendant should not be sentenced, in my opinion, under 21 U.S.C. 174.
>
> There remains to be considered whether punishment is to be imposed under sec. 7237(a) of Title 26 U.S.C. which prescribes a minimum penalty of two years imprisonment for a violation of the Harrison Act, or under the general conspiracy provision in 18 U.S.C. 371 which does not specify any minimum penalty. As between the two statutes, the particular is entitled to preference over the general statute. (cases cited.) * * * Accordingly, it is the opinion of the Court that the defendant should be sentenced under section 7237(a) of Title 26, U.S.C. * * * I therefore sentence David Shackleford to the minimum 2 years under section 7237(a) of Title 26." (J.A. 79.)

If the sentencing court insists that it had the power to impose a ten year sentence on Carminati because it presumed from the verdict that the hard core of the conspiracy was to violate 21 U.S.C. 174 as amended by the Narcotics Control Act of 1956, then what the Government wants this Court to believe is that the jury found the petitioner guilty of conspiring in violation of 21 U.S.C. 174, to commit the illegal acts listed in sec. 174, and too, that Carminati was either not guilty of the charge of conspiring in violation of 18 U.S.C. to violate the Title 26 sections noted in the indictment or that the guilt relating to 21 U.S.C. 174 was greater than the guilt under the Title 26 statutes for which section 7237(a) prescribed more lenient punishment.

To attribute to Congress an intent to repeal 18 U.S.C. 371 in such cases, or to give to the courts a mandate to sentence a defendant convicted of a conspiracy in violation of 18 U.S.C. 371, to a more severe penalty without being first indicted for such an offense, or to subject him to even more severe penalties if he is to be punished under the amended provisions of either the old or new laws pertaining to narcotics offenses when the indictment, the evidence, the instructions and the verdict of conviction showed that he was entitled to be punished under the law(s) in effect prior to July 19, 1956—is a usurpation of the court's power to sentence a defendant for the crime for which he was indicted, tried and convicted.

Such interpretation of the law is fraught with the most serious dangers to our constitutional system of division of powers which prohibits Congress from invading this field which has always been protected by the Bill of Rights and denies unto the legislature the right of creating laws prohibited by the Fifth and Sixth Amendments.

The verdict of the jury—"We find Tony Carminati guilty on Count 14"—did not include a judicial determination of guilt for the acts set forth in the recital of the deeds done or what would be done "as part of the conspiracy".

The allegations as written, the evidence adduced coupled with the explanations and instructions offered by the court, were, from all indications, simply a characterization of the illegal plan which the prosecution claimed the defendant had in mind.

Therefore, as distinguished from the effectuation of such plan, the ambiguity must be construed in favor of the defendant and the trial court, under no circumstances, was empowered to invade the province of the jury and conclude that the core of the conspiracy was too in violation of 21 U.S.C. 174 as amended by the Narcotics Control Act of 1956 and for that reason be subject to the harshest mandatory minimum sentence under that Act when a more lenient choice was available.

Petitioner makes this comment as to the cases cited by the Government in its opposition:—

None apply when compared to the facts in the instant case, but the court in the *Davis* case (279 F. 2d 576 at 578) does admit that if there is a showing that the defendant was misled, much less, prejudiced, by the reference to the Harrison Act, rather than to the appropriate sections of the current Act, he would, of course, be entitled to a new trial. (See petitioner's citation of cases on this point in Pet. brief: *U. S. v. Ogull*, 149 F. Supp. 272 (p. 25); *Boyd v. U. S.*, 116 U.S. 616, 8 S. Ct. 524, 532 (p. 40); *Amendolu v. U. S.*, 17 F. 2d 529 (p. 30); *Bazzell v. U. S.* 187 F. 2d 878 (p. 26).)

As to the second question propounded by the Government regarding the admitted failure of the trial court to ask petitioner, before sentencing, whether he had anything to say, required remand to the District Court for resentencing, your petitioner notes that in *Green* v. *U. S.*, 81 S. Ct. , this Court affirmed the decision of the lower court (256 F. 2d 483) because the record showed that the defendant was not denied the right to which Rule 32(a) entitled him.

In Anthony Carminati's case, present counsel was retained in September, 1959, began reading the record immediately thereafter and in December, 1959, discovered the trial court's error in failing to grant allocution. Appropriate relief under 28 U.S.C. 2255 was sought that same month and on January 11, 1960, appeared before the trial court and argued the motion. At that time it was pointed out that to grant the relief prayed for—that of resentencing the defendant properly in accordance with Rule 32(a), he would then be shown to be serving a ten year term and not a term of ten years and 309 days as he is doing now,—a definite benefit to the petitioner. (J.A. 56-58).

On February 18, 1960, in denying the motion, the court declared—"To grant this application • • • would be slavish adherence to form; it would exalt form over substance." J.A. 64).

This opinion was not only affirmed by the Appeals Court in 281 F. 2d 908, but the lower court admonished counsel in that opinion for even bringing up the subject thusly:

> "Carminati's contention that he should be given an opportunity for resentence because he was denied the right of allocution provided for in Rule 32(a) of the Federal Rules of Criminal Procedure is in this case so plainly without merit that we are not required to consider the question of whether this contention may be raised by a motion under 28 U.S.C. 2255. • • • "

Yet, at the oral hearing, the trial court, admitted:

> "In any event, it is clear, the record is clear that the defendant himself was not asked if there was any statement that he desired to make or why sentence should not be imposed. * * *(J.A. 50)
>
> The Prosecutor: Yes. It also appears that no request was made of your Honor to hear any statement by the defendant.
>
> The Court: I would not agree with those cases. I tell you that now. * * * I do not think there is a basic constitutional right involved here. I think this is a pure statutory right, and this may make some difference in the conclusion. If this were a constitutional right, it would be an entirely different matter. * * *I do not know of any constitutional provision that demands the court to ask a man at the time of sentence as to why sentence should not be imposed."

Your petitioner is still of the opinion that where the Federal Rules of Criminal Procedure are violated by the Court to the prejudice of the defendant, the defendant has not been afforded "due process" under the Constitution and therefore is not swayed by that court's opinion.

A reading of the record will further indicate that any attempt on the part of the trial court to shift the apparent error onto the court reporter is without merit (J.A. 20-43) because the record indicates other errors committed by the court were contrary to the remarks made in defense of the court's usual procedure. (J.A. 20-43)

At each and every point, just before sentence was imposed on the other defendants involved, including Salvatore and Ralph Russano, the court sought the guidance of either the clerk of the court or the prosecutor to determine whether or not the counts in the indictment called for punishment under the old or new narcotic acts and invariably, just prior to pronouncement of sentence, would ask of the prosecutor, as for example in the case of the defendant Galgano,

"Does the prosecutor desire to be heard?

The prosecutor: No, your Honor.

The Court: Again, in this instance no purpose would be served by any extended discussion of the nature of the crime. This defendant has a fairly extensive background of criminality and anti-social conduct, and one of his offenses includes an earlier sale of narcotics of which he was convicted in this court. * * * There is a conviction only on one count, is that right, the conspiracy count?

The Prosecutor: That is right, your Honor.

The Court: Under the circumstances the court imposes a sentence of ten years." (J.A. 37.)

And just prior to this episode, the court asked Galgano's counsel, *not* Galgano—"All right, is there anything that you desire to say on behalf of your client with respect to sentence and why sentence should not be imposed, other than what you have already said?

The record is clear that in this case, the defendant Carminati was denied the opportunity to which Rule 32(a) entitled him, and the court has admitted it.

Your petitioner has met the heavy burden of showing that he was not accorded the personal right which Rule 32(a) guarantees, and for that reason asks this Honorable Court to reject any contention that merely affording defendant's counsel the opportunity to speak fulfills the dual role of Rule 32(a). [*Taylor* v. *U. S.*, doc. #16726, Dec. 13, 1960, 9th Cir.]—*Green* v. *U. S.*, 81 S. Ct. , 1961—and find that his sentence was illegal and must be avoided, especially when anything his counsel did say did not plead any cause in mitigation of the sentence or why sentence should not have been pronounced.

"We do not doubt that (Carminati) has a record of anti-social behavior, but all the greater need for care lest, perhaps without fully realizing it, we tolerate a

little less than procedural due process for him, satisfying ourselves that normal requirements need 'not be so fastidiously insisted upon in the case of wicked people.' See *Malinski* v. *People of the State of New York*, 1945, 324 U.S. 401, 418, 65 S. Ct. 781, 790, 89 L. Ed. 1029. It must always be remembered that the innocent, for whose benefit primarily our fundamental procedural safeguards exist, can be protected effectively only if we insist strictly upon due process for all. The safeguard of procedural due process will be inadequate unless it shall be 'inexorable'. See classic statement of Mr. Justice Brandies in the *St. Joseph Stock Yards Co.* v. *U. S.*, 1936, 298 U.S. 38, 73, 56 S. Ct. 720, 80 L. Ed. 1033; cf. Mr. Justice Roberts, dissenting in *Snyder* v. *Com. of Mass.*, 1934, 291 U.S. 97, 137, 54 S. Ct. 330, 78 L. Ed. 674. If a few guilty persons win liberty thereby, the price is a small one to pay for the assurance we all gain that judicial procedure is and will be essentially 'fair.' *U. S.* v. *Claudy*, 204 F. 2d 624 (1953) (3rd Cir.)

The prosecution erred in this case to the detriment and prejudice of the defendant and the lower courts have affirmed those errors, but in light of the petition presented herein, Anthony Carminati prays that justice will prevail.

Respectfully submitted,

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